

# Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers

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## I. INTRODUCTION

Cigarette-induced death and illness is one of the most important and costly health problems facing society. Each year smoking kills 350,000 persons.<sup>1</sup> This yearly death toll exceeds the total number of Americans killed in World War I, the Korean War, and Vietnam.<sup>2</sup> In comparison to other critical health problems, AIDS has killed a total of 60,000 and heroin and cocaine each year claim an estimated combined total of 10,000 persons.<sup>3</sup> Recent studies show that cigarettes are the leading cause of death from cancer in women.<sup>4</sup>

At present non-smokers pay a large portion of the health and welfare costs of smoking-caused cancer through higher taxes and health insurance premiums.<sup>5</sup> Cigarette smoking costs the nation more than \$52 billion annually in

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1. *Hearings Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, H. of Rep., 99th Cong., 2d Sess. 99-167, at 4 (1986) [hereinafter *Hearings*]. Compare: "Experts say smoking kills nearly 400,000 people in the United States each year . . ." Atlanta J.-Const., May 13, 1990, at A-14, col. 1. In contrast, Elizabeth Whelan stated that smoking causes 350,000 deaths per year. E. WHELAN, A SMOKING GUN: HOW THE TOBACCO INDUSTRY GETS AWAY WITH MURDER, 10 (1984).

2. Atlanta J.-Const., Feb. 21, 1987, at A-8, col. 1.

3. AIDS, Atlanta J.-Const., Aug. 15, 1989, at A-37, col. 4. *Hearing on the Health Consequences of Smoking: Nicotine Addiction Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, H. of Rep., 100th Cong., 2d Sess. 100-68, at 23 (July 29, 1988) [hereinafter *Nicotine Addiction*].

4. A dramatic 44 percent increase in lung cancer deaths among women since 1979 is fueling a steady rise in the country's deadliest form of cancer, federal health researchers [CDC] reported Thursday. Health experts say the trend is a direct result of women's smoking habits. . . . "[T]he bad news is that lung cancer is now the leading cause of cancer death in women. It has eclipsed breast cancer, and it is getting worse."

Atlanta J.-Const., July 28, 1989, at A-1, col. 1. "[T]hose who smoke two packs a day are seven times as likely to suffer a heart attack as those who have never smoked." Atlanta J.-Const., Jan. 25, 1990, at A-1, col. 1.

5. When a smoker contracts cancer, his or her medical expenses are often paid for by his or her health insurance. These costs are in turn distributed among the other persons (non-smokers and smokers) with health insurance. The non-smoker's rates are therefore higher because of the cancer expenses of the smoker.

If the smoker lacks health insurance, he or she will seek to obtain treatment at a public hospital. The costs of this treatment are borne, in large part, by society in general.

The thought behind the absolute liability proposal is that since cigarettes are unique, not necessities and cigarette-caused cancer is identifiable, the market system would work more efficiently if the costs of smoking-caused cancer were born, as much as possible, by the cigarette manufacturers and smokers.

Elizabeth M. Whelan argues: "How can the economic burden of tobacco be shifted to where it belongs—on the backs of smokers and tobacco producers? One frequently proposed solution is a 'health tax' on cigarettes, with proceeds used to fund social welfare programs which pay for public medical costs of smoking." E. WHELAN, *supra* note 1, at 151. Of course, it is highly unlikely that Congress would pass such an act, therefore, the absolute liability proposal rests upon creative decision-making by the courts.

Several scholars argue, however: "Although nonsmokers subsidize smokers' medical care and group life insurance, smokers subsidize nonsmokers' pensions and nursing home payments. On balance, smokers probably pay their way at the current level of excise taxes on cigarettes . . ." Manning, Keeler, Newhouse, Sloss & Wasserman, *The Taxes of Sin: Do Smokers Pay Their Way?*, 1989 J. A.M.A. 1604 [hereinafter *The Taxes of Sin*].

health care and lost productivity.<sup>6</sup> The cigarette advertising industry spends approximately \$250,000 per hour, every hour, day and night for product promotion.<sup>7</sup> One result of this, if not the goal, is the acquisition of the smoking habit by teenagers.<sup>8</sup> Another problem that has surfaced is that cigarette smoking is addictive—as addictive as heroin.<sup>9</sup> Young people, through advertising, are enticed to smoke, become addicted, and as a result die in their prime from cancer. With a \$52 billion cost to society, addiction of children, and death to men and women — at the peak of their productive lives—the time has come to examine how the legal system deals with the costs of smoking.

This Article makes clear that because of problems with the present causes of action, the costs of smoking rest upon the non-smoker as well as the smoker. It argues for a reversal of this legal subsidy, shifting the costs to the cigarette manufacturer and the smoker by means of absolute liability.

The most important contemporary suit against the cigarette manufacturers is *Cipollone v. Liggett Group, Philip Morris and Lorillard*:

Rose Cipollone was born in 1925 and began to smoke in 1942. She smoked Chesterfield brand cigarettes . . . [S]he stated that she smoked the Chesterfield brand to be "glamorous," to "imitate" the "pretty girls and movie stars" depicted in Chesterfield advertisements . . . In 1981, Mrs. Cipollone was diagnosed as having lung cancer, but even though her doctors advised her to stop smoking, she was unable to do so. Mrs. Cipollone continued to smoke until June of 1982 when her lung was removed. Even after that, she smoked occasionally, in secret. She testified that she was "addicted" to cigarette smoking . . . Mrs. Cipollone died on October 21, 1984.<sup>10</sup>

Mr. and Mrs. Cipollone filed a complaint against several cigarette manufacturers in the federal district court on August 1, 1983.<sup>11</sup> They sought damages resulting from Mrs. Cipollone's lung cancer. The promise of the *Cipollone* case, and several others,<sup>12</sup> was that cigarette manufacturers would be taken to trial and be required to pay for the damages caused by smoking. Indeed, the

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In reply, cigarette excise taxes go into the general fund and do not help to reduce non-smokers' health insurance costs, nor do they pay for treatment for smokers with cancer. The excise taxes do not encourage cigarette manufacturers to market a safer cigarette nor to spend funds on research to cure cancer. Finally, since excise taxes are not earmarked for cancer caused by smoking, they do not depict the true costs of smoking.

6. Atlanta J.-Const., Feb. 21, 1990, at A-7, col. 6.

7. *Hearings, supra* note 1, at 2. *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1497 (D.N.J. 1988) (\$2.3 billion divided by 8,760 hours = approximately \$250,000 per hour).

8. "About 26 percent of people between ages 12 and 17 try smoking. . . . Those who smoke are lighting up their first cigarette at the average age of 12." Atlanta J.-Const., May 17, 1990, at A-8, col. 3.

9. "Surgeon General C. Everett Koop announced unequivocally today that cigarettes and other tobacco products are addictive like heroin and cocaine . . ." Atlanta J.-Const., May 16, 1988, at A-3, col. 1.

"This Report shows conclusively that cigarettes and other forms of tobacco are addicting in the same sense as are drugs such as heroin and cocaine." THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL vi (1988) [hereinafter REPORT OF THE SURGEON GENERAL].

10. *Cipollone v. Liggett Group, Inc.; Philip Morris, Inc.; Lorillard, Inc.*, 893 F.2d 541, 548-51 (3d Cir. 1990).

11. *Id.* at 552.

12. As of October, 1985, at least 240 cigarette and tobacco related cases had been filed. Note, *Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers*, 4 HARV. L. REV. 809, n.1 (1986). In June of 1988, following the \$400,000 *Cipollone* verdict, Atlanta attorney Guerry Thornton said: "I expect to see 300 to 500 new suits filed because of this." Atlanta J.-Const., June 19, 1988, at C-7, col. 1.

greater promise was that a wave of cigarette suits—as substantial as with asbestos—would arise and compel a shift in the allocation of cigarette losses.<sup>13</sup>

The reality of the *Cipollone* cases is more like a ripple on a pond. After twelve *Cipollone* decisions, almost seven years of litigating, and a plaintiffs' expenditure of perhaps \$1.2 - \$3 million, the cigarette manufacturers can still boast that they have not paid a penny to a cancer plaintiff.<sup>14</sup> The *Cipollone* case demonstrates that the courts are far from a clear and coherent statement of cigarette manufacturers' liability. No cause of action has emerged that will enable smokers to recover their damages and shift the losses from the public in general to the shoulders of the smokers and the cigarette manufacturers. A review of the causes of action considered in the *Cipollone* cases will manifest that confusion abounds and more trials, appeals, and visits to the Supreme Court lie ahead.<sup>15</sup>

More litigation and greater complexity in cigarette cases was guaranteed when the federal court of appeals held in the *Cipollone* case that the Cigarette Labeling and Advertising Act of 1965: "preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes . . . ."<sup>16</sup> On remand, the district court interpreted the appellate decision as "preempting the plaintiff's failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud claims to the extent that they sought to challenge the defendants' advertising, promotional, and public relations activities after January 1, 1966."<sup>17</sup> As a result of these decisions, a cause of action might exist before 1966, but be barred thereafter.

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13. See, Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 92 (1987).

Why then . . . has there been a new wave of cigarette litigation sweeping the country? One of the primary reasons is the substantial changes in the law of strict liability, comparative negligence, state of the art, and other theories of liability. Another major factor is the approach taken by plaintiffs' counsel in the prosecution of large, sophisticated toxic-tort litigation. No longer do we find sole practitioners trying these cases, but rather larger firms with the financial, technical, and manpower resources necessary to go the distance. Groups of law firms have joined together to litigate these cases collectively.

Id.

14. The court of appeals referred to ten *Cipollone* opinions plus the one in January equals eleven. *Cipollone*, 893 F.2d at 564. The January decision was stayed to allow the New Jersey Supreme Court to interpret the New Jersey Products Liability Act. *Cipollone v. Liggett Group, Inc.*, No. 88-5732 (3d Cir. stay granted 3/2/90). The Supreme court has granted *certiorari* in the *Cipollone* case. *Cipollone v. Liggett Group, Inc.*, 59 U.S.L.W. 3652 (U.S. Mar. 25, 1991) (cert. granted).

"[Marc Z.] Edell [a New Jersey attorney who has argued much of the *Cipollone* case] says his firm has spent about \$600,000 in out-of-pocket expenses and racked up about \$2 million in billable time in the *Cipollone* litigation." Rust, *Smoke Alarms*, CAL. LAW. 22, 25 (Oct. 1987). This statement is three years old, however.

"The tobacco industry proudly points to the fact that it has never paid a single dollar to a plaintiff for a smoking-related illness . . . ." Note, *Liability of Cigarette Manufacturers for Smoking Induced Illnesses and Deaths*, 18 RUTGERS L.J. 165 (1986) (quoting from the Philadelphia Inquirer, Dec. 1, 1985, at 1A, col. 1).

15. See *Cipollone*, 893 F.2d at 559-73.

16. *Id.* at 552.

17. *Id.* at 552-53. Other courts have reached the same result. See *Rovsdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988), *aff'd* 623 F. Supp. 1189 (E.D. Tenn. 1985); *Palmer v. Liggett Group*, 825 F.2d 620 (1st Cir. 1987), *rev'd* 633 F. Supp. 1171 (D. Mass. 1986); *Stephen v. American Brands*, 825 F.2d 312 (11th Cir. 1987) (per curiam); *Semowich v. R.J. Reynolds Tobacco Co.*, 1988 WL 86, 313 (N.D.N.Y. 1988). *But cf.* *Forster v. R.J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 700-01 (Minn. Ct. App. 1988) (no preemption found absent express statement from Congress).

Five years after the filing of the *Cipollone* complaint:

[T]he case proceeded to trial on plaintiff's failure to warn, design defect, express warranty, fraudulent misrepresentation, and conspiracy claims . . . . On April 21, 1988, at the close of plaintiff's proofs, the district court struck the design defect claim on the ground that plaintiff had failed to present sufficient evidence that defendants' failure to market an alternatively designed cigarette . . . was a proximate cause of Mrs. Cipollone's . . . death. [J]ury deliberations were limited to the fraudulent misrepresentation claim against each defendant, the conspiracy to defraud claim against each defendant, the failure to warn claim against Liggett, and the express warranty claim against Liggett.

. . . .

After a four-month trial . . . the jury rejected the fraudulent misrepresentation claims and the conspiracy to defraud claims . . . . As to the failure to warn claim against Liggett, the jury concluded that Liggett breached its duty to warn of the health hazards of smoking before 1966 . . . . As to the express warranty claim, the jury found that Liggett had breached an express warranty made to consumers. The jury awarded Mr. Cipollone \$400,000 to compensate him for damages that he sustained from Liggett's breach of warranty; the jury awarded Mrs. Cipollone's estate no damages on the breach of warranty claim.<sup>18</sup>

In January, 1990, the Court of Appeals reversed portions of the District Court's decision and remanded the *Cipollone* case for a new trial.<sup>19</sup> Part of the January decision favors the Cipollones (both now dead) and part favors the cigarette manufacturers. In regard to comparative fault, the court held that "Mrs. Cipollone's post-1965 conduct should have been considered as relevant to avoidable consequences, possibly reducing her damages but not foreclosing liability."<sup>20</sup> In responding to Liggett's claimed errors in regard to failure to warn, the court held that there was no basis for holding as a matter of law that Liggett was under no duty to warn of the dangers of cigarettes because their dangers were commonly understood.<sup>21</sup> The court stated in dealing with the U.C.C. express warranty claim: "We hold that once the buyer has become aware of the affirmation of fact or promise, the statements are presumed to be part of the 'basis of the bargain' unless the defendant, by 'clear affirmative proof,' shows that the buyer knew that the affirmation of the fact was untrue."<sup>22</sup>

The appellate court in *Cipollone* was also faced with the issue of whether comparative fault was available in an express warranty action. It held that

a comparative fault defense is available in an express warranty action, but only to the extent that the defendant can show that the buyer misused or abused the product or used the product after learning that the warranty was false. . . . Liggett must be given the opportunity at the outset [of the new trial] to prove that at some point prior to January 1, 1966, Mrs. Cipollone ceased to believe or never believed, Liggett's advertisements.<sup>23</sup>

The appellate court also held that the express warranty claim could rest upon the cigarette advertisements submitted to the jury. The evidence (advertise-

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18. *Cipollone*, 893 F.2d at 553-55.

19. *Id.* at 583.

20. *Id.* at 558.

21. *Id.* at 559.

22. *Id.* at 568.

23. *Id.* at 573-74.

ments) "compellingly points to an express warranty . . . by means of various advertising media, not only repeatedly assured [the consumer] that smoking Chesterfields was absolutely harmless, but in addition the jury could very well have concluded that there were express assurances of no harmful effect on the lungs."<sup>24</sup>

The District Court had ruled that the recently amended (1987) New Jersey Products Liability Act functioned to bar the Cipollone's risk-utility claim.<sup>25</sup> The Act provides that when a person asserts a design defect claim against a manufacturer, the manufacturer shall not be liable if:

The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product . . . .<sup>26</sup>

The Court of Appeals rejected the application of the statute in the *Cipollone* case: "We do not believe that [the Act] was a codification of existing common law . . . ." <sup>27</sup> It then went on to reject the notion that the harms from smoking were obvious before 1966: "[W]e cannot find . . . there was sufficient evidence for the district court to find, that the 'inherent[ly] [dangerous] characteristic[s]' of cigarettes were known to the 'ordinary consumer or user,' prior to 1966. This is an issue of fact for the jury."<sup>28</sup>

On appeal Mr. Cipollone also alleged that the Federal Cigarette Labeling and Advertising Act did not preempt his post-1965 intentional tort claims. The court disagreed:

Plaintiff's intentional tort claim is founded on an allegation that defendants "intentionally . . . through their advertising, attempted to neutralize the [federally mandated] warnings that were given regarding the adverse effects of cigarette smoking." . . . The plaintiff's claim manifestly "challenge[s] . . . the propriety" of the defendants' "actions with respect to the advertising and promotion of cigarettes." . . . The district court did not err in construing our preemption decision [against the plaintiff].<sup>29</sup>

Although the courts have labored hard at the oars, after seven years of litigation and over eleven reported *Cipollone* decisions, cigarette plaintiffs have not yet recovered a penny. They may be no closer to a victory than they were thirty-seven years ago.<sup>30</sup> In the January 1990 concurring opinion in *Cipollone*, Chief Judge Gibbons wrote: "[T]here will now be a new trial, and a new ap-

24. *Id.* at 576.

25. *Id.* at 577.

26. *Id.* The Court of Appeals has recently stayed the application of its January 5 opinion in the *Cipollone* case pending a New Jersey Supreme Court ruling on the state's products liability statute. "The New Jersey Supreme Court's decision in *Dewey v. Brown & Williamson Tobacco* . . . is expected to answer . . . whether the legislature intended the new law to be applied retroactively or only prospectively." *Prod. Safety & Liab. Rep.* 237 (BNA) (March 9, 1990).

27. *Cipollone*, 893 F.2d at 578. The Act was amended in 1987.

28. *Id.* at 578.

29. *Id.* at 582.

30. "The first wave of lawsuits brought against cigarette manufacturers began in 1954. These cases were unsuccessful. . . . It is apparent that the legal theories of recovery employed in these earlier cases limited their likelihood of success and provided the defendants with the opportunity to utilize procedural tactics that depleted plaintiffs' resources . . . ." Edell, *supra* note 13, at 90.

peal, and the Supreme Court may still tell the parties . . . they should try again."<sup>31</sup>

The anticipated march of new cigarette cases has come to a halt.<sup>32</sup> Indeed, the *Cipollone* line of cases clearly demonstrates that there is a need for a simpler and more efficient cause of action in dealing with cigarette cancer. The proposal responds to this need by arguing for the adoption of absolute liability for cancer caused by smoking. The goal of the proposal is to reallocate the loss, from non-smokers and society in general, to the cigarette manufacturers and smokers.

Part II of this Article presents the history, social policy, and economic theory supporting the absolute liability cause of action. Part III explains the absolute liability proposal as applied to cigarette manufacturers. Parts IV and V suggest the need for a change in cause-in-fact for cigarette litigation.

## II. THE HISTORY, POLICY, AND ECONOMICS OF ABSOLUTE LIABILITY AS APPLIED TO CIGARETTE MANUFACTURERS

Under the theory of absolute liability, an injurer is liable if he causes damage.<sup>33</sup> There is no defense except the absence of causation.<sup>34</sup> In one of the earliest recorded torts cases (1466), the defendant was held liable on the basis of absolute liability:

[I]f a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others. . . . [I]f a man commits an assault upon me and I cannot avoid him, if he wants to beat me, and I lift my stick in self-defense in order to prevent him, and there is a man in back of me, and I injure him in lifting my stick, in that case he would have an action against me . . . .<sup>35</sup>

Absolute liability is different from strict liability. In both strict liability related to land (referred to as abnormally dangerous activities by the American

31. *Cipollone*, 893 F.2d at 583. The Supreme Court has granted *certiorari* in the *Cipollone* case. *Cipollone v. Liggett Group, Inc.*, 59 U.S.L.W. 3652 (U.S. Mar. 25, 1991) (cert. granted). The Court will rule on the preemption question and perhaps other cigarette issues. *Atlanta J.-Const.*, Mar. 25, 1991, at A-1, col. 4.

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[I]n most . . . instances a prima facie . . . case can be made against the manufacturers of cigarettes . . . . With all these prima facie cases . . . one would expect there would be droves of lawyers signing up these cases and filing them. One would be wrong. There are no droves of lawyers handling cigarette disease cases; there is only a handful across the entire United States. The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their cases, no matter how hard they look.

How can this be? People suffering from a cigarette disease often have viable claims with huge damages. Where are the lawyers? They are handling asbestos cases, DES cases, benzene cases . . . . They are not handling cigarette disease cases and the reason why is simple: they cannot afford to. The cigarette manufacturers, through a national team of lawyers, have adopted a uniform strategy of defense designed to ensure that few lawyers can afford to take on a cigarette case, and that even fewer can see the case through to trial. In short, by making the cost of litigation so high, the cigarette manufacturers have closed the courthouse doors to most people . . . .

Townsend & Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W.L. REV. 275, 276-77 (1988).

33. See Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 3 (1970).

34. *Id.*

35. Anonymous, Y.B. 5 Edw. 4, f. 7, pl. 18 (K.B. 1466).

Law Institute) and strict liability in regard to products, there is a balancing of costs and benefits. For both of these forms of strict liability, defenses are available, such as proximate cause and assumption of risk.<sup>36</sup> For absolute liability, however, the only defense is cause in fact.

The proposal is that cigarette manufacturers should be held liable on the basis of absolute liability. We should "dust off" the "old" tort of absolute liability: if a cigarette manufacturer causes injury (as defined in Parts III, IV, and V), he is liable. The remainder of this part will be devoted to considering why a cigarette manufacturer should be held absolutely liable for smoking-caused cancer from an historical view, a social policy view, and an economic view.

### A. *An Historical View of Absolute Liability*

Tort law began with absolute liability. To suggest that cigarette manufacturers should be held absolutely liable is merely a return to the foundation of civil liability. Professor Wex Malone makes clear that the basis of primordial law was absolute liability resting upon causation:

[If at] your request I accompany you when you are about your own affairs; my enemies fall upon and kill me, you must pay for my death. You take me to see a wild beast show or that interesting spectacle, a mad man; beast or mad man kills me; you must pay. You hang up your sword; someone else knocks it down so that it cuts me; you must pay. In none of these cases can you honestly swear that you did nothing that helped to bring about death or wound.<sup>37</sup>

Dean Prosser summarized tort law before 1850 as follows:

Writs in trespass were confined to forcible acts in breach of the King's peace. The writ of trespass on the case developed out of a practice of applying to the Chancellor, in cases where no writ could be found in the Register to cover the plaintiff's claim, for a special writ, in the nature of trespass, drawn to fit the particular case.

. . . [I]n its earlier stages trespass was identified with the view that liability might be imposed without regard to the defendant's fault . . . .<sup>38</sup>

Professor Malone agrees that prior to about 1800, liability was absolute: "The imposition of virtual no-fault liability in both Trespass and Trespass on the Case in England continuously throughout the middle ages and, in fact, up until the nineteenth century . . . reflected the ethical, social and economic needs of the times . . . ."<sup>39</sup>

Within the last twenty years, absolute liability has been applied to abnormally dangerous activities such as blasting and in 1969, the New York Court of Appeals in *Spano v. Perini Corp.* stated:

The concept of absolute liability in blasting cases is hardly a novel one. The overwhelming majority of American jurisdictions have adopted such a rule. . . . Indeed, this court itself, several years ago, noted that a change in our law would conform to

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36. See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 710-12 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

37. Malone, *supra* note 33, at 1.

38. W. PROSSER, *TORTS* 2 (1976).

39. Malone, *supra* note 33, at 24.

the more widely (indeed almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass.<sup>40</sup>

If absolute liability should apply to blasting because of the certain and unpreventable damages, even more should it apply to the manufacturing of cigarettes with 350,000 smoking-caused deaths per year. As concluded in *Spano*: "The question . . . was . . . *who* should bear the cost of any resulting damage . . . ."<sup>41</sup> With cigarette-caused cancer, the question is also who should bear the loss, non-smokers and society in general, or cigarette manufacturers and smokers.

Apparently due to the high costs (for defendants) of absolute liability, the concept of negligence emerged during the middle of the 1800s.<sup>42</sup> The reason, usually presented, for the development of negligence, was to subsidize the infant industries in the United States.<sup>43</sup> Professor Gregory explained the subsidy theory as follows:

The foregoing account shows that the principle eliminating the unintended trespass as a substantive tort and establishing a consistent theory of liability based on fault was developed to confer on industrial enterprise an immunity from liability for accidental harms to others. Apparently, the idea was to tax enterprise with the cost of only those damages avoidably caused.<sup>44</sup>

Professor Horwitz is more forceful: "[C]ommon law doctrines appeared to present a major cost barrier to social change . . . . Under the pressure of damage judgments, American courts before the Civil War began to change legal rules in order to subsidize the activities of great works of public improvement . . . 'factories, machinery, dams, canals and railroads.'"<sup>45</sup>

In the mid-1800s, there were, perhaps, good reasons for subsidizing the railroads and young industries, but today, there are few reasons for the legal system to continue a subsidy for the tobacco industry.<sup>46</sup> Rather than subsidizing the tobacco industry, the industry should be absolutely liable. As negligence has been replaced by strict liability in certain areas,<sup>47</sup> the tobacco manufacturers should be subject to absolute liability in order to afford them the opportunity to pay their own way.<sup>48</sup> The thrust of the negligence action is to place the parties in the courtroom on an equal footing.<sup>49</sup> The impact of the assumption of risk and the cause-in-fact defense, in cigarette litigation, is that the smoker is going to lose, in part because of inadequate financial resources.<sup>50</sup> He cannot compete

40. *Spano v. Perini*, 25 N.Y.2d 11, 15, 250 N.E.2d 31, 33, 302 N.Y.S.2d 527, 530 (1969).

41. *Id.* at 17, 250 N.E.2d at 34, 302 N.Y.S.2d at 530.

42. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 70-71 (1977).

43. *Id.*

44. Gregory, *Trespass To Negligence To Absolute Liability*, 37 VA. L. REV. 359, 382 (1951).

45. M. HORWITZ, *supra* note 42, at 70-71 (quoting *Losee v. Buchanan*, 51 N.Y. 486, 484 (1873)).

46. The idea behind an economic subsidy is to support an industry until it is able to mature, to stand on its own. Tobacco long ago reached that level of economic maturity. Today it is able to pay its own way—including damages. The need for a legal and therefore economic subsidization of the tobacco industry (if it ever existed) has long passed.

47. Products liability is perhaps the most obvious example.

48. The price of the product should represent not merely labor and materials, but also the damages caused by the product.

49. Vandall, *Judge Posner's Negligence-Efficiency Theory: A Critique*, 35 EMORY L.J. 405 (1986).

50. See Townsley & Hanks, *supra* note 32, at 277.



in the legal arena.<sup>51</sup> The smoker (and his or her family) will lose the case, not because it is unjust, but because the smoker is not financially equipped to compete in discovery and at trial.<sup>52</sup>

Since 1849 there have been numerous legal developments (comparable to the absolute liability I am proposing) that make it easier for an injured person to win in tort: strict liability, *res ipsa loquitur*, negligence per se, and a deterioration of immunities.<sup>53</sup> Strict liability does not require the plaintiff to prove negligence and is based on the theory that the loss should rest upon the seller.<sup>54</sup> At first blush, strict liability appears designed for cigarette plaintiffs. All cigarette-cancer cases have failed, however, including those resting on strict liability.<sup>55</sup>

The concepts of *res ipsa loquitur*<sup>56</sup> and negligence per se<sup>57</sup> reflect the underpinnings of absolute liability and have furthered an expansion of liability.<sup>58</sup> Professor Gregory argued:

For years there have been some American precedents openly embracing the doctrine of [absolute liability] as part of our common law. But most of our state courts have been more cautious; and if they have achieved what seems like absolute liability, they have done it under some category of negligence. As indicated above, *res ipsa loquitur* was their normal recourse, in such instances.<sup>59</sup>

The theory of negligence per se is that if a person violates a regulation or an ordinance (state or federal), the court may decide that this is evidence of negligence.<sup>60</sup> In truth, it is unlikely that a cigarette manufacturer will be found in violation of a statute. The reason is simple: these acts have often been drafted expressly to protect the cigarette manufacturer.<sup>61</sup>

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51. See *id.* at 275.

52. *Id.* at 277. The cigarette manufacturers have, to date, won the "second wave" of cases. In Tennessee, the *Roysdon* case received a directed verdict by the district court because the plaintiff had failed to show that the R.J. Reynolds Tobacco Co. cigarettes were "defective or unreasonably dangerous." Atlanta J.-Const., Dec. 14, 1985, at A-14, col. 1.

The first trial in *Horton v. American Tobacco Co.* ended in a mistrial in January, 1988, after the jurors told the judge they were hopelessly deadlocked. Trial was set for September 4, 1990. Prod. Safety & Liab. Rep. 545 (BNA) (May 18, 1990).

As noted above, the \$400,000 verdict in the *Cipollone* case has been reversed and a new trial is pending. See *Cipollone*, 893 F.2d 541.

In *Galbraith v. R.J. Reynolds Tobacco Co.*, No. 144417 (Cal. Super. Ct., Santa Barbara Co., Dec. 23, 1985), the jury returned a verdict for R.J. Reynolds: "Belli's client (who succumbed to congestive heart failure) wasn't one of the thousands of individuals who clearly died from a cigarette-related disease. . . . [T]he *Galbraith* case was not as 'clean medically' as others." Legal Times, Jan. 27, 1986, at 2, col. 1.

53. See F. VANDALL, STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS 6-12 (1989).

54. See *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

55. *Cipollone*, 893 F.2d 541.

56. PROSSER & KEETON, *supra* note 36, at 242-62.

57. *Id.* at 229-31.

58. See Vandall, *Applying Strict Liability to Pharmacists*, 18 U. TOL. L. REV. 1, 16-18 (1986).

59. Gregory, *supra* note 44, at 383.

60. See PROSSER & KEETON, *supra* note 36, at 229-31.

61. The Federal Food, Drug and Cosmetics Act, *infra* note 118, and the Consumer Product Safety Act, *infra* note 120, both exclude tobacco products from their coverage. New Jersey, 15 PSLR 670, section 3(a)(2) and California, Civil Code, section 1714.45(a)(1), have recently passed legislation that protects the cigarette manufacturers.

Historically, government, the family, and certain charitable institutions have been protected from suit by strong defenses known as immunities. Recently many of these immunities have been cast aside. This deterioration in immunities, making it easier to sue and recover, has resulted in an expansion of liability similar to the expansion proposed under absolute liability. As important institutions (governments, families, charities) have become subject to liability because of the removal of immunities, so should the activity of cigarette manufacturing lose its vast array of legal protections. Absolute liability is proposed as a means of placing liability on cigarette manufacturers. Professor Schwartz summarizes the deterioration of immunities:

Among the leading events within tort law during the past quarter-century has been the abrogation of a variety of immunities that intruded into tort law late in the nineteenth century and early in the twentieth. Thus, almost everywhere, the tort immunity of charitable institutions has been done away with. Intrafamilial immunities increasingly have been discarded, rendering spouses liable to each other, parents liable to their children, and vice versa. In addition, a broad, insensitive doctrine of governmental immunity generally has been replaced by a carefully selected set of particular immunity rules.<sup>62</sup>

With the expansion in tort liability over the last 140 years, aimed at making it easier for an injured person to sue and recover, the insulation of the cigarette industry is an anomaly.<sup>63</sup> Absolute liability is a means of ending this insulation.

#### B. *The Social Policy Reasons for Applying Absolute Liability to Cigarette Manufacturers*

The reasons that have been embraced for the application of strict liability to product sellers also support the extension of absolute liability to cigarette manufacturers. These policy reasons run the full spectrum from reallocating the loss, and the protection of health, through superior knowledge and economic considerations.

##### 1. *Reallocating the Loss*

The reasoning behind reallocating the loss is that the cigarette manufacturer is in a better position than the non-smoker and society in general to bear the damages caused by smoking. Justice Traynor, in *Escola v. Coca-Cola* (concurring opinion) (1944), stated that liability in products cases should rest upon absolute liability. He reasoned: "[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects

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62. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 964-65 (1981).

63. In contrast, the veil protecting the manufacturers of alcohol from suit has been pierced. Summary judgment for the beer manufacturer was reversed in *Hon v. Stroh*, 835 F.2d 510 (3d Cir. 1987), where the plaintiff allegedly developed pancreatitis from beer consumption. Again the court in *Brune v. Brown Forman Corp.*, 758 S.W.2d 827 (Tex. App. 1988), reversed a summary judgment in favor of the manufacturer. The issue was whether the manufacturer of tequila had a duty to warn a college student of the dangers of drinking straight shots of Pepe Lopez Tequila. Joyce Brune died allegedly as a result of drinking tequila shooters.

that are a menace to the public."<sup>64</sup> The California Supreme Court, in *Greenman v. Yuba Power Products, Inc.*, adopted the reasoning and holding that had been foreshadowed in *Escola*. The court concluded: "The purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>65</sup> This reasoning goes back at least to the 1913 case of *Mazetti v. Armour*: "The obligation of the manufacturer should . . . rest . . . upon 'the demands of social justice.' . . . Our holding is that . . . a manufacturer of food products under modern conditions impliedly warrants his goods . . . ."<sup>66</sup>

The impact of absolute liability upon cigarette manufacturers is that they will raise the price of their goods to cover losses. This will have the beneficial effect of forcing the price of the product to reflect the damage caused.<sup>67</sup> Since there will be many large cancer "claims" under absolute liability, and all cigarette manufacturers will be subject to such "claims," the impact upon cigarette manufacturers will be widespread and rather immediate. It is unlikely that one manufacturer will have a competitive advantage over another under absolute liability. Loss shifting will not put cigarette manufacturers at a disadvantage as compared to other products. Smokers have few choices: pay the new, higher price or quit.<sup>68</sup> Few smokers will likely shift to smokeless tobacco<sup>69</sup> or pipes because they are quite different activities. The reallocation of losses to cigarette manufacturers will have two benefits: first, prices will rise and some people will stop smoking; second, fewer cigarettes will be sold.<sup>70</sup>

64. *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-44 (1944) (Traynor, J. concurring).

65. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 695, 701 (1962).

66. *Mazetti v. Armour & Co.*, 75 Wash. 622, 627, 135 P. 633, 636 (1913).

67. There may be a possibility that shifting all of these cancer losses to the cigarette manufacturers will force them into bankruptcy. If the cigarette manufacturers went bankrupt, large portions of the losses might then be shifted back upon the non-smokers, smokers, and the public in general.

There are several replies to this. First, there is no data on how much loss the cigarette manufacturers could absorb before being forced into bankruptcy. Judging from the billions of dollars per year that they spend on promotions, their capacity to absorb losses may be enormous. Second, products liability suits are surgically precise, not bludgeons. In the Pinto gas tank case, the Pinto was removed from the market. Ford has continued to prosper, however. Indeed, the "father of the Pinto," Lee Iacocca, seems to be doing quite well. Finally, a "golden goose" approach would likely be employed by the bankruptcy court. A separate trust would be created by the court and funded by the cigarette manufacturers. The level of funding would guarantee fair payments to injured smokers but would not kill the "golden goose," the cigarette manufacturers. See *Atlanta J.-Const.*, June 26, 1990, at E-1, col. 2.

68. Some smokers, rather than pay the higher prices, may grow their own tobacco and roll their own cigarettes, to be sure.

69. See Note, *Product Liability for Smokeless Tobacco: Should Tobacco Companies be Liable for a Failure to Warn?*, 21 SUFFOLK U.L. REV. 768-71 (1987).

70. Compare:

The available clinical and research data suggest that the demand for cocaine is relatively elastic among the great majority of consumers who are occasional or recreational users. . . . Price increases will reduce the quantity demanded, while price decreases should have the opposite effect. On the other hand, . . . addicts represent inelastic demand. Addicts are less likely than nonaddicts to be responsive, to changes in price in setting their demand for cocaine.

Cloud, *Cocaine, Demand and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 762-63 (1989).

There have been several estimates as to how much the price of cigarettes will increase if manufacturers are subject to liability. Marcia Stein reports: "One Wall Street analyst has estimated that if the tobacco industry was forced to pay \$100,000 to each of 65,000 claimants per year, the price of a pack of cigarettes would rise only 22 cents."<sup>71</sup> Professor Tribe, however, estimates: "If smokers win, cigarette makers may be held accountable for an estimated \$80 billion a year in smoking-related losses; cigarette prices may shoot up to \$3 a pack."<sup>72</sup>

## 2. Health Protection

A fundamental reason for applying absolute liability to cigarette manufacturers is to protect life and health.<sup>73</sup> The theory is that, if the manufacturer is subject to absolute liability, he will exercise a high degree of care in order to avoid liability. Critics might respond by saying that a cigarette will always be lethal. However, we do not know the extent to which a cigarette can be made safe. We may have seen the light of a safer cigarette in the paladium example.<sup>74</sup> Perhaps it will be possible for the cigarette manufacturers to develop a cigarette that does not cause cancer or a form of nicotine that is not addicting.<sup>75</sup> At present, society has no clue as to how safe a cigarette might become. If it is accurate to state that holding manufacturers liable has made numerous products safer, such as automobiles,<sup>76</sup> airplanes,<sup>77</sup> and vaporizers,<sup>78</sup> then it makes sense to conclude that absolute liability will also encourage manufacturers to develop safer cigarettes.

## 3. Superior Knowledge

The third reason for holding a cigarette manufacturer absolutely liable is that he is an expert in regard to cigarettes. The courts have indicated that because of superior knowledge it is appropriate to hold the manufacturer liable as compared to the consumer.<sup>79</sup> This is especially true in regard to cigarettes. The average smoker is not well educated and is not at the top of the income ladder.<sup>80</sup>

71. *Legal Attack on Tobacco Flares*, American Medical News, Sept. 20, 1985, at 49, col. 2, quoted in Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 650 n.126 (1987).

72. Tribe, *Federalism With Smoke and Mirrors*, The Nation 788 (June 7, 1986).

73. The application of absolute liability to cigarette manufacturers will force them to invest in research for a safer cigarette. It may also encourage them to seek a "cure" for cigarette-induced cancer. If a "cure" were discovered that was cheap and effective, the cigarette manufacturers could greatly reduce the number of cancer-related damage suits. This discovery would, of course, be of great value to all of society.

74. The "safer" palladium cigarette would reduce the risk of lung cancer by 8-17%. Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1493 (D.N.J. 1988).

75. Current studies suggest that nicotine is the addictive substance in tobacco. REPORT OF THE SURGEON GENERAL, *supra* note 9, at i.

76. See *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Civ. App., 1974).

77. See *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694 (1978).

78. See *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967).

79. See *Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

80.

[B]lacks, teenage girls and people with a high school education or less continue to pick up the habit . . .

[T]he national Centers for Disease Control (CDC) said about 1.5 million Americans—mostly white, well-

He or she is not likely to realize that cigarettes are as addictive as heroin<sup>81</sup> and that cigarettes kill "more than the combined death tolls from alcohol, illegal drugs, traffic accidents, suicide, and homicide . . ."<sup>82</sup> He or she is not likely to realize that each year cigarettes kill more than the total combined American battle deaths in World War II and Vietnam,<sup>83</sup> nor that smoking causes cancer of the lungs, larynx, oral cavity, and esophagus, as well as heart disease.<sup>84</sup> Although the smoker may have heard in jest of "coffin nails,"<sup>85</sup> he or she may not realize that the statement is true. Absolute liability allows society to hold the cigarette manufacturer to the knowledge of these things as an expert. Held to this level of knowledge, the cigarette manufacturer will take appropriate action in regard to safety. Often the smoker is addicted and is not in a position to make a rational choice.<sup>86</sup>

#### 4. *The Cheapest Cost Avoider*

Dean Calabresi has developed a unique test for strict liability. His goal is to reduce the amount spent on the entire legal system because of "a desire to accomplish better primary accident cost reduction."<sup>87</sup> In order to reach this goal, he proposes a test that rejects both negligence and traditional strict liability:

The strict liability test we suggest does not require that a government institution make such a cost-benefit analysis. It requires of such an institution only a decision as to which of the parties to the accident *is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made*. The question for the court reduces to a search for the cheapest cost avoider.<sup>88</sup>

If we ask who is the cheapest cost avoider between the smoker and the cigarette manufacturer, it seems that the answer will always be the manufacturer. He has the assets, the experience, the knowledge, and the ability to compile data, and to test and make changes in the product. He is not addicted.

#### 5. *Economic Analysis*

In terms of economic efficiency, it would seem that if we are going to permit the losses brought on by smoking, its impact should be isolated to those directly involved. We should create a closed system in which the costs of smok-

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educated adults—kick the habit each year, but at least a million others—predominantly teenagers and women with less than a college education—join the ranks of smokers. . . . The researchers said smoking habits have changed . . . from a widespread practice among all segments of American society to an addiction of poorly educated and low-income people . . .

Atlanta J.-Const., Jan. 6, 1989, at A-3, col. 4.

81. REPORT OF THE SURGEON GENERAL, *supra* note 9, at iv-v.

82. Atlanta J.-Const., Feb. 21, 1987, at A-8, col. 1.

83. *Id.*

84. *Hearings*, *supra* note 1, at 338-40.

85. See R. MILES, COFFIN NAILS AND CORPORATE STRATEGIES 30-53 (1982).

86. See REPORT OF THE SURGEON GENERAL, *supra* note 9, at i. But see Schwartz, *infra* note 99, at 521-22.

87. Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1075 (1972).

88. *Id.* at 1060.

ing are born solely by cigarette manufacturers and smokers. The costs of smoking should be internalized. The price of cigarettes should reflect the damages caused.<sup>89</sup> Absolute liability would help to accomplish this.

Today, the problem is that the costs of smoking are paid for by non-smokers as well as smokers.<sup>90</sup> This occurs in two ways. First, if a smoker has insurance, he or she recovers from his insurance carrier for his or her medical expenses.<sup>91</sup> These expenses are in turn spread among the other smoking and non-smoking policy holders.<sup>92</sup> The result is that non-smokers, through increased health insurance costs, bear much of the costs for the smoker's "freedom" to smoke. A closed system would be accomplished by forcing cigarette manufacturers to pay for smoking-caused damages. The manufacturer would, in turn, pass on the costs by raising prices. The smoker would pay for his own treatment through the higher cigarette costs. The system would be closed and non-smokers would no longer shoulder many of the costs of smoking.

Second, if the smoker lacks insurance or exhausts his insurance and other assets, he will turn to welfare.<sup>93</sup> The result is that the costs of smoking are then spread among the non-smoking (and smoking) public. Economically this is disadvantageous because it conceals the real costs of smoking from the smoker and from the public. That is, cigarettes are inexpensive because manufacturers do not have to pay damages. These costs are covertly spread among the non-smoking public. Since cigarettes are a discrete product (they are not necessities, nor are they building blocks—like steel), it would make more sense to place the loss on the manufacturers and allow the price of cigarettes to rise and reflect the actual costs.

Some argue that because of heavy taxes, cigarettes pay their own way.<sup>94</sup> These taxes flow into a general fund and are not earmarked for smokers' inju-

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89. See Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980); A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 98 (1983).

On the other hand, cigarettes contain all of the elements necessary to be banned by the Consumer Product Safety Commission. See 15 U.S.C. §§ 2051, 2056, 2057, 2058, 2061, 2064 (1990). The CPSC expressly lacks jurisdiction over tobacco products, of course. See *supra* note 61.

Three wheel all-terrain vehicles were recently banned. See *United States v. Polaris Indus.*, No. 87-3525 (D.D.C. Dec. 30, 1987) (1987 WL 33507).

90. In terms of health insurance contracts, it may be argued that the non-smoker has no basis to complain. He knew the price of the insurance when he purchased it. He can not now complain because part of that price includes the coverage of smokers' cancer. However, in terms of efficiency, Shavell and Polinsky argue that the price of a product should reflect the damages it causes. Spreading the losses to non-smokers masks the true cost of smoking. See *supra* note 89.

Another reply to the contract argument is that placing the loss on the cigarette manufacturers has a strong deterrence function. See *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944). They will seek means to reduce damages.

Of course, some of the benefits from the taxes on tobacco products accrue to non-smokers. See *The Taxes of Sin*, *supra* note 5, at 1604; E. WHELAN, *supra* note 1, at 150.

91. Examples of such insurance would be Blue Cross/Blue Shield and health maintenance organizations.

92. Expenses for cigarette cancer are treated like other payments and spread among all of the policy holders. See E. WHELAN, *supra* note 1, at 150.

93. *Id.*

94. "Although nonsmokers subsidize smoker's medical care and group life insurance, smokers subsidize non-smokers pensions and nursing home payments. On balance, smokers probably pay their way at the current level of excise taxes on cigarettes." *The Taxes of Sin*, *supra* note 5, at 1604.

ries, however.<sup>95</sup> To be sure, these funds are not available to injured smokers who do not make welfare claims. They do not affect smokers' insurance claims. By not being earmarked for smokers' health care expenses, these taxes help to conceal the true costs of smoking.

## 6. Other Considerations

As a nation we are concerned with cocaine and heroin, which kill less than 10,000 people per year,<sup>96</sup> but we accept the widespread marketing and advertising of a drug that kills 350,000 people per year. Toward whom is cigarette marketing directed? The answer is clear: children.<sup>97</sup> Cigarette marketing is saying to insecure teenagers, "we have the solution to your insecurity and alienation problems: smoke." These ads are successful. Perhaps the most visible example is automobile racing which appeals to young people. Winston sponsors a series of NASCAR races and their logo appears at every turn. In like fashion, Marlboro is well entrenched in formula-one racing. Most people who smoke began at ages eleven, twelve, or thirteen.<sup>98</sup> By contrast, few adults experiment with cigarettes.

Cigarettes are addictive! The 1988 Surgeon General's report stated:

Careful examination of the data makes it clear that cigarettes and other forms of tobacco are addicting. An extensive body of research has shown that nicotine is the drug in tobacco that causes addiction. Moreover, the processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.<sup>99</sup>

95. "[T]he amount of revenue obtained from these taxes [state and federal excise taxes on cigarettes] is woefully inadequate to cover the cost of smoking. If cigarette smoking provides any economic 'benefit' to the general population, it does so by reducing Social Security payouts to smokers who die prematurely." E. WHELAN, *supra* note 1, at 150.

96. See *Nicotine Addiction*, *supra* note 3, at 23.

97. See DiFranza & Tye, *Who Profits From Tobacco Sales to Children?*, 263 J. A.M.A. 2784 (1990). The billboard depicts a longlegged swimsuit-clad woman lolling under a crystal-clear waterfall. No cigarette package. No cigarette. No smoke. Only the slogan, "The Refreshest," and a brilliant green Salem logo. . . . Synar, backed by many anti-smoking groups, wants the ads out of magazines, newspapers and sports stadiums, and off race cars and billboards. . . . Ban [a cigarette advertising ban] advocates argue that all advertising should be eliminated because it induces youngsters to smoke, rather than propels smokers to switch brands, as the cigarette companies argue.

Atlanta J.-Const., July 3, 1988, at D-1, col. 2.

98.

Ads portraying the cigarettes as a sign of adulthood were obviously designed to attract young people to the habit. For example, American Tobacco began advertising in 1962 that, "Smoking is a Pleasure Meant for Adults," but added, "Lucky Strikes Separate the Men from the Boys . . . but not from the Girls," which is just what the young boy trying to "prove" he was a man wanted to hear. The tobacco industry's contention that it wasn't trying to attract new smokers made no business sense at all.

E. WHELAN, *supra* note 1, at 113. "The government estimates that 3,000 teenagers become regular smokers each day — and 90 percent of all smokers start the habit as teenagers." Atlanta J.-Const., June 1, 1990, at E-1, col. 2.

A solution would be for Congress to "ban" most forms of cigarette advertisements and for the courts to adopt the absolute liability proposal. The "ban" would provide billions of dollars to pay the damages in the suits based on absolute liability. See Atlanta J.-Const., July 15, 1990, at G-1, col. 1.

99. REPORT OF THE SURGEON GENERAL, *supra* note 9, at iii (1988).

Most smokers want to quit, but the task can be so daunting that surprisingly few try, fewer succeed and even fewer seek any help to stop. . . .

What this means is that children try smoking and become addicted.<sup>100</sup> Cigarette marketing is aimed at the teen and pre-teen market, and their aim is accurate. If a free-market system must permit such youth addiction, the costs should be borne by the manufacturer. Children under the age of 18 generally cannot contract,<sup>101</sup> but yet, as a society, we support a \$250,000 per hour<sup>102</sup> advertising expenditure that has as a goal the addiction of children who are too young to contract for an automobile, a house, or a boat.

Cigarette smoking has little social benefit.<sup>103</sup> When courts talk about strict liability and negligence, they often say that whether there should be liability depends on whether the costs of avoiding the activity exceed the benefit of the activity. For example, Judge Learned Hand, in *Carroll Towing* stated:

[T]he owners duty . . . to provide against resulting injuries is a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. . . . [I]f the probability be

During the 1980's about 17.3 million have tried to quit for at least a day each year, but only 1.3 million stay off for a year or more. Of those, about 40 percent relapse in two to 10 years, and half of those never try to quit again.

Atlanta J.-Const., July 25, 1989, at C-1, col. 1.

Schwartz argues that cigarettes are not addictive: "[A]llegedly addictive substances such as tobacco and alcohol do not generate physical withdrawal costs that are so high as to overcome the will of an ordinary person to discontinue use when she comes to believe that the costs of consuming exceed the benefits." Schwartz, *Views of Addiction and the Duty to Warn*, 75 VA. L. REV. 509, 521-22 (1989).

100. *Nicotine Addiction*, *supra* note 3, at 2-3.

101. The contract is not void but voidable on the part of the minor. See H. HUNTER, 2 MODERN LAW OF CONTRACTS § 14.10[i] (1987).

102. See *supra* note 7.

NASCAR officials are circling the wagons. Dependent on the \$55 million annually pumped into their sport by R.J. Reynolds Tobacco Co., and with many race teams backed by smokeless tobacco companies, NASCAR is about to begin a counterattack against recent government efforts to rid sports of tobacco sponsorship.

. . . .

Louis W. Sullivan, Secretary of Health and Human Services, started the furor Feb. 23 . . . when he called for an end to tobacco company sponsorship of sporting events.

"This blood money should not be used to foster a misleading impression that smoking is compatible with good health," Sullivan said at a news conference.

Atlanta J.-Const., Mar. 17, 1990, at C-1, col. 4.

103. An argument can be made that cigarettes have substantial social utility because the cigarette manufacturers donate millions to the arts and to academic research.

An early *Cipollone* case put that line of reasoning to rest, however: Evidence of the benefits of cigarette production to the tobacco industry, the Internal Revenue Service, a manufacturer's stockholders and employees, and to society at large was irrelevant and inadmissible in an action to recover from a cigarette manufacturer for the death from cancer of a consumer who smoked. Under a risk-utility analysis, the risk to the consumer could not be measured against the benefit to society as a test of a product's defectiveness. In order to be admissible the evidence must show that the benefit to the individual consumer outweighed the risks.

*Cipollone v. Liggett Group*, 644 F. Supp. 283, 290 (D.N.J. 1986).

To admit into evidence all of the jobs created by the activity and the donations made by the sellers would suggest that selling cocaine is a socially beneficial activity. The response to this is that selling cocaine is illegal and therefore different from cigarettes. But in torts cases, legislative standards (legality) have never been the test for whether an act is negligent or a product defective. See *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 65, 577 P.2d 1322, 1325 (1978). Generally the statutory standard is only evidence of due care. *Id.*

Smokers would likely argue that there is psychological satisfaction in smoking and that it is a response to peer group pressure. If smoking were not so lethal, this argument might have some merit. Peer group pressure is an acceptable reason for trying a hoola-hoop or trying to water ski. It is not an acceptable reason for playing Russian roulette.



called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; i.e., whether B is less than PL.<sup>104</sup>

Similarly the 1978 case of *Barker v. Lull* concludes:

We hold that a trial judge may properly instruct the jury that a product is defective in design . . . if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.<sup>105</sup>

This is often a challenging question in cases involving automobiles,<sup>106</sup> airplanes,<sup>107</sup> and forklifts<sup>108</sup> because the social benefit of the product is substantial. This is an easy question for cigarettes, however, because they have no beneficial use. The myth is that smoking is relaxing and helps the smoker to concentrate.<sup>109</sup> Actually, smoking merely relieves the tension produced by the addiction to nicotine.<sup>110</sup> If the smoker did not smoke, he or she would not be addicted to nicotine, would not be tense, and would not need a cigarette to relax.

For those who argue that smoking keeps them slim, new research shows that it only keeps off five to ten pounds on the average.<sup>111</sup> There are safer ways to lose weight.

We subsidize the manufacture and sale of cigarettes in order to protect the jobs of large numbers of tobacco farmers and manufacturers.<sup>112</sup> With this in mind, Whelan, nevertheless, concludes that the costs of smoking exceed the benefits by over \$17 billion:

According to 1978 estimates, smoking accounts for nearly 8 percent of all direct health care costs and over 11 percent of the total direct and indirect cost of disease in the United States. . . .

. . . [C]igarette-related diseases are responsible for more than \$11 billion per year in medical expenses and \$36 billion in lost productivity. . . .

These figures do not take into account the indirect impact on families, employers, friends, community, etc., or the multiplier effects of lost incomes.<sup>113</sup>

Whelan suggests that cigarettes may only contribute \$29.2 billion to the economy: "[T]otal domestic sales are over \$20 billion per year. . . . Exports bring in another \$2.2 billion per year. Federal, state and municipal revenues from excise

104. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

105. *Barker v. Lull Eng'g. Co.*, 20 Cal. 3d 413, 432, 574 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978).

106. *See Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Ct. App. 1974).

107. *See McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005, 174 Cal. Rptr. 694 (1978).

108. *See Barker*, 20 Cal. 3d at 432, 574 P.2d at 455-56, 143 Cal. Rptr. at 237.

109. "Beyond the physical addiction, there is the social-psychological dependence on the smoking habit. For many smokers, the behavior modification needed to stop smoking presents more of a barrier than the physical addiction. (For example, many people who give up smoking 'don't know what to do' with their hands.)" E. WHELAN, *supra* note 1, at 2.

110. *See REPORT OF THE SURGEON GENERAL, supra* note 9, at iv. Peer pressure and psychological addiction cannot be dismissed of course. "A substantial part of the 'enjoyment' [from smoking] that . . . occurs comes from releasing the 'tension' caused by the gnawing, cigarette induced desire." White, *Strict Liability of Cigarette Manufacturers and Assumption of Risk*, 29 LA. L. REV. 596 (1969).

111. "Smokers on average weigh five to 10 pounds less than non-smokers." Atlanta J.-Const., Apr. 6, 1989, at A-10, col. 5.

112. *See E. WHELAN, supra* note 1, at 147-48. *See also* White, *supra* note 110, at 592-94.

113. *See E. WHELAN, supra* note 1, at 146-47.

and sales taxes on tobacco products amounted to over \$7 billion in 1981."<sup>114</sup> Such a conclusion is speculative and Whelan admits: "No economist has ever attempted a comprehensive and complete assessment of tobacco's effect on the U.S. economy, including both the costs related to tobacco-induced disease and its contribution to the Gross National Product. . . ." <sup>115</sup> In short, the costs of smoking exceed its benefits. Tobacco causes more death and destruction than it produces in GNP.

Three-wheel All Terrain Vehicles (ATVs) have some utility in that they are fun to ride, can be used to check large parking lots, and to patrol fences and pipe lines; however, they have caused hundreds of deaths since 1982.<sup>116</sup> Because of these losses, three-wheeled ATVs have been banned from sale in the United States.<sup>117</sup> If ATVs have some utility and have only caused a total of 1600 deaths, should we not consider the application of absolute liability to the manufacture and sale of cigarettes that kill 350,000 persons yearly?

Help in dealing with the cigarette problem is unlikely to come from Congress. Most legislation has worked to insulate and protect the cigarette manufacturers. This is also likely to be true in the future. Under the Food, Drug and Cosmetics Act, a drug is defined as: "(B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man . . . ; (C) articles (other than food) intended to affect the structure or any function of the body of man. . . ." <sup>118</sup> Under this definition, it is clear that cigarettes are strong drugs. They adversely affect the oral cavity, lungs, heart, and kidney, for example. One would expect cigarettes to be regulated by the Federal Food, Drug and Cosmetics Act (FDA). This is a faulty assumption, however. A court has rejected the regulation of cigarettes as "drugs" under the Act:

The court granted summary judgment against an anti-smoking group's effort to force the F.D.A. to regulate cigarettes. The court agreed with the Commissioner's view that the statutory definition included "only those cigarettes for which therapeutic claims have been made," emphasizing that "[t]he 'intent' element of the definition of drug, when applied to cigarettes, has always been construed as that of the vendor."<sup>119</sup>

The Consumer Product Safety Commission (CPSC) was implemented to protect the consumer from injurious products.<sup>120</sup> However, the Consumer Product Safety Act carefully excludes tobacco from the province of the agency: "The term 'consumer product' . . . does not include—(B) tobacco and tobacco products."<sup>121</sup>

In regard to Congress, we have seen the avoidance of serious attempts to protect the consumer from the hazards of cigarette smoking.<sup>122</sup> Clearly, no

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114. *Id.* at 149.

115. *Id.*

116. *See* United States v. Polaris Indus., No. 87-3525 (D.D.C. Dec. 30, 1987) (1987 WL 33507).

117. *See id.*

118. 21 U.S.C.A. § 432(h)(2) (Supp. 1969).

119. *Action on Smoking & Health v. Califano*, Food Drug Cos. L. Rep. CCH ¶ 38,219 (D.D.C. 1979).

120. *See* The Consumer Product Safety Act, 15 U.S.C. § 2051(a)(3) (1990).

121. *Id.* at § 2052(a)(1).

122. *See* E. WHELAN, *supra* note 1, at 106-08. The pressure from cigarette manufacturers is often not subtle: "Tobacco companies have contributed more than \$1 million to Sen. Jesse Helm's political campaigns and built a museum in his honor." Atlanta J.-Const., July 2, 1990, at A-4, col. 5.

meaningful legislation that encroaches upon cigarette manufacturing or sales will come out of Congress. Professor Macey provides an explanation for this:

According to the so-called interest group or economic theory of legislation, market forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups. The wide-spread acceptance of interest group theory has led to suspicion about much of what Congress does, creating, in turn, a climate hospitable to judicial interference with legislative outcomes.<sup>123</sup>

An exception to this is the Cigarette Labeling and Advertising Act of 1965.<sup>124</sup> Today, as modified, that Act provides that each pack of cigarettes and each advertisement for cigarettes must contain one of four warnings. One reason the cigarette-label warnings have largely failed is because of the effective advertising and marketing by cigarette manufacturers. It can be argued that the sterile warnings have been weakened and undermined by cigarette overpromotion. In *Stevens v. Parke Davis & Co.*,<sup>125</sup> the drug manufacturer provided a warning of the risks of Chloromycetin, an antibiotic, on the drug label. However, Parke Davis then engaged in an elaborate advertising campaign, led by their "detail men," to persuade medical doctors that the warnings were too severe and should be disregarded. The court held that the injured patient could recover from Parke Davis because the advertising and overpromotion by Parke Davis significantly watered down the warnings. *Stevens* supports the argument that the cigarette warnings have been undermined by clever and continuous advertising and marketing.<sup>126</sup> The point is that the bland and vague federally required warnings are clearly eclipsed by the inviting and enticing cigarette ads featuring cowboys, water falls, sports, and attractive young people.

### III. THE ABSOLUTE LIABILITY PROPOSAL

The proposal has four parts.<sup>127</sup> First, the liability of the cigarette manufacturer is absolute. Second, the plaintiff who has regularly smoked one pack of cigarettes per day for at least fifteen years has a presumption that his or her cancer was caused by smoking. Third, the damage recovery is limited to four types of cancer: lung, larynx, oral cavity, and esophagus. The plaintiff must

The tobacco industry is forging new, behind-the-scenes relationships in its effort to fight smoking bans and excise taxes and polish its image.

The \$35 billion-a-year industry has aligned itself with organized labor and black, Hispanic and women's groups, whose civil rights rhetoric and appeals for social justice have a special resonance in American life.

Cash and public relations know-how are being lavished on these allies. Tobacco money may buy anything from scholarships and entertainment to printing and legal services.

Atlanta J.-Const., May 23, 1988, at C-1, col. 5.

123. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986) (citations omitted); see also R. POSNER, *THE FEDERAL COURTS* 271 (1985); Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 876 (1973).

124. 15 U.S.C.A. § 1333-36 (1990).

125. 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

126. See *supra* note 7.

127. Perhaps the first article to mention a no-fault scheme for cigarette caused cancer was Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 314-15 (1977). See also, White, *supra* note 110, at 589.

submit a statement from a physician that he has contracted one of the four types of cancer and that it was probably caused by smoking. Fourth, damages under the proposal are restricted to medical expenses and lost wages; punitive damages are not available and there is a \$100,000 cap on pain and suffering.

One of the most important aspects of the absolute liability cause of action is that it does not depend upon advertising, promotion, or warnings by the cigarette manufacturer and will, therefore, not be affected by the preemption decision.<sup>128</sup> Further, since absolute liability has as its fundamental goal the reallocation of losses from non-smokers and the general public onto cigarette manufacturers and smokers, defenses such as assumption of risk, contributory negligence, and misuse will not apply.

The proposal would function as follows. John sues A.B.C. (cigarette manufacturer) for one or more of the four cancers caused by smoking. The judge adopts the absolute liability cause of action and sends John's case to the jury. The only remaining issues for the jury are cause in fact and damages. The only defense is cause in fact. Since John has claimed that he smoked a brand of cigarette manufactured by A.B.C. for over fifteen years and a physician has testified that John's lung cancer was probably caused by smoking, John receives a presumption that A.B.C. caused his cancer. The presumption shifts the burden of proof to A.B.C.<sup>129</sup> This does not mean that all cases will go to the jury, nor that the jury verdict will always be for the plaintiff.<sup>130</sup> For example, the judge might find, after A.B.C. presents evidence, that there was no evidence that one of the four types of cancer was present.<sup>131</sup> In the recent *Galbraith v. R.J. Reynolds Tobacco Co.* case, for example, the plaintiff lost before the jury because cause in fact was not proved.<sup>132</sup> The jury reported that they wanted to find for the plaintiff, but felt that the attorney had not proved his case. If the jury agrees with John's case, they may award all reasonable medical expenses (past, present, and future) as well as lost wages, related to the smoking-caused cancer. As a matter of fairness and equity, John can not recover punitive damages. In order to recover punitive damages some form of willfulness must be shown on the part of the defendant.<sup>133</sup> Absolute liability rests upon loss reallocation and other social policies.<sup>134</sup> It does not suggest or imply that the cigarette manufacturer's conduct was willful. His recovery of pain and suffering would be limited to a maximum of \$100,000.<sup>135</sup>

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128. See *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986).

129. See *infra* notes 176-79.

130. *Id.*

131. *Id.*

132. See *Galbraith v. R.J. Reynolds Tobacco Co.*, No. 144417 (Cal. Super. Ct., Santa Barbara Co., Dec. 23, 1985).

133. See *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986). In order to encourage attorneys to bring the first suit in each jurisdiction, however, the judge may want to allow the recovery of punitive damages if willfulness can be shown.

134. See *supra* notes 64-95.

135. See O'Connell & Carpenter, *Payment for Pain and Suffering Through History*, 50 INS. COUNS. J. 411 (1983); Zelsermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27 (1955).

Compare with medical malpractice actions: CAL. CIV. CODE § 3333.2(b) (West Supp. 1989) places a \$250,000 limit on recoveries for pain and suffering. The statute was held to be constitutional in *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985). In *Illinois*, ILL. REV. STAT

This cap on pain and suffering and the elimination of punitive damages is a matter of balancing several considerations. The goal is not to bankrupt the cigarette manufacturers—merely force them to pay for the damages caused by their products. However, experience with the *Cipollone* case teaches that the first case to bring the absolute liability proposal will likely be long, expensive, and hard-fought. Therefore, for the first case brought in each jurisdiction, in order to encourage suit and to compensate the attorneys, punitive damages (if willfulness is shown) and full pain and suffering should be recoverable. The second and later suits will not be able to recover punitive damages and will have a cap of \$100,000 on pain and suffering, however.

Because the cause of action is absolute liability, no defenses such as assumption of risk,<sup>136</sup> contributory negligence,<sup>137</sup> or misuse,<sup>138</sup> are available. The goal is to create a closed system where the manufacturers and smokers, but not non-smokers, pay the costs of smoking. Defenses would furnish the cigarette manufacturers with a means for shifting the loss back to smokers and, through their insurers, to non-smokers. Insurers who have paid claims to smokers, or on behalf of smokers, could sue the cigarette manufacturers under absolute liability.<sup>139</sup> This would result in lower insurance rates for both non-smokers and smokers. Equally important, states and governmental entities (such as hospitals), who have made welfare or health care expenditures because of one of the four listed cancers, could sue and recover their payments from the cigarette manufacturers under absolute liability.

Each jurisdiction should be able to eliminate the risk of a double recovery in the case where both the hospital and the smoker sue the cigarette manufacturer. If the smoker lacks insurance and has received medical assistance from a public hospital, then he has paid nothing and only the public hospital would have an action for the value of the medical treatment provided. If the smoker has insurance, he will have an action, under the absolute liability proposal, for the deductibles and co-payments he has made, and the insurance carrier will be able to recover for the medical expenses it has paid to the smoker, the hospital, or the doctors.

The states could use these millions of recovered dollars to retrain displaced tobacco farmers and workers in related industries. The funds would also be available for payment to tobacco farmers who seek welfare. Part of the recovered funds could also be set aside for research into the question of what crops

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ch. 70, § 101 placed a \$500,000 limit on total recovery, but this act was struck down as violative of the Constitution in *Wright v. Central DuPage Hospital Assoc.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). The National Childhood Vaccination Injury Act of 1986 caps pain and suffering at \$250,000. This involves children with perhaps full lives to live, not persons often in the last third of their lives. 42 U.S.C.S. Sec. 300 aa-1 (Law. Co-op. Supp. 1990).

136. PROSSER & KEETON, *supra* note 36, at 711-12.

137. *Id.*

138. *Id.*

139. In order to avoid bringing a lawsuit, smokers with cancer might prefer to recover from their insurers. The absolute liability proposal gives standing to the insurer to sue for the amount paid to the smoker.

The information on injuries caused to third persons from side stream smoke is still unfolding. The author takes no position on whether these third parties, or their insurers, should be able to recover under absolute liability. "Women who . . . breathe the cigarette smoke of others may be up to three times more likely to develop cancer of the cervix than other women, a new study suggests." *Atlanta J.-Const.*, Mar. 17, 1989, at A-5, col. 1.

might be substituted for tobacco. The need for such funds and for research rests upon the assumption that increased prices for cigarettes (because of absolute liability) will result in a decrease in demand.<sup>140</sup>

During the trial determining whether smoking caused the plaintiff's cancer, the judge must be alert that the cigarette manufacturer will attempt to win through superior financial strength.<sup>141</sup> This will be a serious problem both during discovery and at trial. The first rule of the Federal Rules of Civil Procedure provides: "These rules . . . shall be construed to secure a just, speedy, and inexpensive determination of every action."<sup>142</sup> This means that the judge is bound to use every technique at his or her disposal to make certain the trial is affordable to the plaintiff. To insure an economical cigarette-cancer trial, the judge may be required to limit the scope of discovery or to limit the number or testimony of witnesses at trial.<sup>143</sup>

#### IV. THE POLICIES SUPPORTING A MODIFICATION TO CAUSE IN FACT

Until recently, the keystone to tort liability was cause in fact. In order to recover civil damages, a plaintiff had to prove that his damages were caused in fact by the act of the defendant. There are two generally accepted tests for cause in fact. First, the "but for" test. This test is applied by asking whether the injury would not have occurred "but for" the defendant's conduct.<sup>144</sup> If the injury would have occurred in spite of the defendant's act, then the defendant was not a cause in fact of the injury and there is no liability. Second, the "substantial factor" test.<sup>145</sup> This asks whether the defendant's conduct was a "substantial factor" in bringing about the injury. It admits that there may be numerous causes of the injury and asks merely was this one a "substantial factor." If the answer is negative, there can be no liability.

Dean Leon Green has shed light on the cause in fact inquiry by arguing that cause in fact is a matter of science.<sup>146</sup> Green's test is: Did defendant's conduct have something to do with the plaintiff's injury as a matter of science? In most cases, cause in fact is straightforward and creates no problems. For example, in a fist fight, it may be clear that defendant broke the plaintiff's nose; or in a car crash, it may be clear that defendant's careless driving caused the plaintiff's broken leg. Applying Green's test to cancer, the question would be: did cigarette smoking have something to do with the cancer as a matter of science.

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140. See Cloud, *supra* note 70, at 762-63.

141. Cigarette manufacturers have grossly inflated the costs of suits:

by resisting all discovery . . . thus requiring a court hearing and order, . . . by getting confidentiality orders attached to the discovery materials . . . , by taking exceedingly lengthy oral depositions . . . and by gathering . . . every scrap of paper ever generated about a plaintiff, . . . by taking endless depositions of plaintiffs, expert witnesses, . . . by naming multiple experts of their own, . . . [a]nd . . . by taking dozens . . . of oral depositions, all across the country . . . in the final days before trial.

Townsley & Hanks, *supra* note 32, at 277.

142. FED. R. CIV. P. 1.

143. See Townsley & Hanks, *supra* note 32, at 279-84.

144. PROSSER & KEETON, *supra* note 36, at 265-68.

145. *Id.*

146. See Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

The courts have not shied away from tough cases in which it was not clear that the defendant was a cause in fact of the plaintiff's injury. These challenging cases are an admixture of fact and social policy. The best known cause in fact case is *Summers v. Tice*,<sup>147</sup> involving three hunters. The two defendants negligently fired their shotguns in the direction of the plaintiff. One pellet hit him in the eye. From the facts, the pellet could have been fired from the rifle of either defendant. Faced with the prospect of letting both escape liability because the plaintiff could not prove which one was the cause in fact of his injury, the court held instead that the plaintiff could recover the whole amount from either defendant:

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers . . . They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless . . .

[T]he same reasons of policy and justice shift the burden to each of the defendants to absolve himself if he can . . .<sup>148</sup>

More recently, the diethylstilbestrol (DES) cases have forced the courts to be as far-reaching in regard to cause in fact, as the problems created by the technology that produced the injury. In *Sindell v. Abbott Laboratories*,<sup>149</sup> the best known DES case, the plaintiff's mother took DES in order to prevent a miscarriage while the plaintiff was *in utero*. The plaintiff, now an adult, developed vaginal cancer. From the facts it is clear that her mother could not prove who manufactured the particular DES that she consumed. The court was faced with the choice of creating law or dismissing the case. The court held that if the plaintiff joined the manufacturers of a substantial share of the DES produced, she could recover from them in proportion to the share of the DES market represented by the defendants. The court reasoned:

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. . .

From a broader policy standpoint, defendants are better able to bear the cost of injury . . . "[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."<sup>150</sup>

The *Sindell* case was followed, in time, by *Collins v. Eli Lilly Co.*,<sup>151</sup> a Wisconsin case. The facts are similar in that the plaintiff developed vaginal cancer because her mother took DES (while the plaintiff was *in utero*) and the plaintiff could not prove who manufactured the particular DES. The Wisconsin

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147. 33 Cal. 2d 80, 199 P.2d 1 (1948).

148. *Id.* at 86-88, 199 P.2d at 4-5.

149. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

150. *Id.* at 510-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.

151. 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

Supreme Court rejected the *Sindell* rule, however, and held that the plaintiff need only show that her mother consumed the same form of DES (color of pill, shape) as manufactured by the defendant. Further, rather than recovering a percentage of her damages as provided in *Sindell*, the *Collins* court held that she could recover all of her damages (except punitives) from the one DES manufacturer. The court reasoned:

Practical considerations favor permitting the plaintiff to proceed . . . against one defendant. One alternative would be to require the plaintiff, as in *Sindell*, to join as defendants "a substantial share" of the producers . . . . Another alternative would be to require the defendant to join a "reasonable number" of possibly liable defendants . . . . [E]ither alternative would waste judicial resources by requiring an initial determination of whether the plaintiff has joined a sufficient number of defendants.

Thus, the plaintiff need commence suit against only one [DES] defendant . . . .<sup>152</sup>

*Summers*, *Sindell*, and *Collins* make clear that, in contemporary cases involving the outer limits of science, social policy is an important portion of cause in fact and the court must be as creative as demanded by the facts of the case and the needs of justice.

Virtually everyone agrees that cigarette smoking causes cancer.<sup>153</sup> The United States Government unequivocally states that: "Cigarette smoking is the major single cause of cancer mortality in the United States."<sup>154</sup> In 1964, the Surgeon General's Report stated: "Cigarette smoking is causally related to lung cancer in men . . . . The data for women . . . point in the same direction."<sup>155</sup> More recent studies indicate: "Women's risk of lung cancer has increased by a factor of four since the early 1960s, when smoking became more popular among women. In 1986, lung cancer overtook breast cancer as the leading cause of cancer deaths among women."<sup>156</sup>

Where then is the disagreement in regard to cause in fact and cigarette smoking? The disagreement emerges as a function of our court system. Presently, the plaintiff (or her survivor) has the burden of showing that "but for" smoking the defendant's brand of cigarettes, she would not have been injured.

152. *Id.* at 193, 342 N.W.2d at 50.

153. See E. WHELAN, *supra* note 1, at 83-87.

Smokers are 10 times more likely to die from lung cancer than nonsmokers. Very heavy smokers (two packs or more per day) are up to 25 times more likely to die of lung cancer.

. . . .

Cigarette smoking has been established as a significant cause of cancer of the larynx, oral cavity, esophagus and bladder, and is significantly associated with cancer of the pancreas and kidney.

E. WHELAN, *supra* note 1, at 11.

Compare, "American Tobacco Co. . . . is sticking to the hard-line position . . . that lung cancer has not been scientifically linked to cigarette smoking." Atlanta J.-Const., Jan. 6, 1988, at D-1, col. 2, with "EPA scientists will conclude that smoking is responsible for more than 3,000 cases of lung cancer among non-smokers every year." Atlanta J.-Const., May 9, 1990, at A-1, col. 4 and "Dr. Stanton A. Glantz of the University of California at San Francisco estimated that passive smoke killed 50,000 Americans a year, two-thirds of whom died of heart disease." N.Y. Times, May 29, 1990, at C-1, col. 3.

154. SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING: CANCER V (1982).

155. ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH 31 (1964) [hereinafter SMOKING AND HEALTH].

156. Atlanta J.-Const., Jan. 25, 1990, at A-1, col. 1.



At trial, one of the cigarette manufacturers' chief defenses is "other cause."<sup>157</sup> That is, the manufacturer is free to prove that the cause in fact of the plaintiff's cancer may have been, for example, a food she consumed, the air she breathed, a pesticide sprayed in her garden, asbestos dust she breathed at work, or an unexplained hereditary tendency to develop cancer.<sup>158</sup> At trial, the government's position that cigarettes cause cancer is, at present, not determinative. The issue is whether smoking was a cause in fact of this plaintiff's particular cancer. The plaintiff must prove that it was. A presumption is needed to make certain that in most cases the plaintiff's case will reach the jury.<sup>159</sup> *Summers, Sindell*, and *Collins* support the adoption of a presumption in which the plaintiff has smoked for fifteen years or more, claims one of the four types of cancer, and a doctor states that the cancer was likely caused by smoking.

The first cigarette case to be tried in the 1980s, *Galbraith v. R.J. Reynolds Tobacco Co.*,<sup>160</sup> highlighted a fundamental problem: people who smoke and die often have other illnesses that may also have been a cause in fact of death. The position of the cigarette manufacturers is that they should only pay if the plaintiff's death would not have occurred "but for" smoking their brand.<sup>161</sup> In *Galbraith*, the jury returned a verdict for the cigarette manufacturer.

The *Galbraith* trial has obscured the reality of cause in fact: every injury always has several causes in fact. Over 35 years ago, Dean Leon Green stated: "There may be and usually are several factors contributing to a plaintiff's hurt, but it is not required that a defendant's negligence be the only cause of the hurt. It is enough that the defendant's negligence is a material factor in the result."<sup>162</sup> For example, consider the case where Sally punches Paul's nose and breaks it. There are several causes in fact under the "but for" test: Sally's fist, the weak nature of Paul's nose (perhaps he had broken it, a year ago, playing football), the bar that served Paul and Sally drinks (both are under the legal age for consuming alcohol), Sally's mother and father (without them, no Sally), and Paul's mother and father (ditto). Of course, in most civil cases, these other causes are not usually raised as cause in fact issues. However, in the recent cigarette cases, cause in fact has become a *cause celebre* and every "other cause" is argued by the manufacturer. For example, two cigarette plaintiff's attorneys suggest:

157. See Townsley & Hanks, *supra* note 32, at 286-91.

158. *Id.*

159. Townsley and Hanks argue that "Judicial notice should be taken that cigarette smoking can and does cause lung cancer," Townsley & Hanks, *supra* note 32, at 285.

Garner, on the other hand, suggests that: "[A] rebuttable presumption of causation based on long years of smoking should be established." Garner, *supra* note 127, at 315. He did not present the policies behind this concept, nor the impact upon the trial, however.

Rosenberg argues that "courts determine causation under a proportionality rule, which would hold manufacturers of toxic agents liable for the proportion of total injuries attributable to their products." Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984).

160. See Townsley & Hanks, *supra* note 32, at 296-98.

161. *Id.*, at 286-91.

162. Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 475 (1950). See Rosenberg, *supra* note 159, at 851.

The Big-6 [cigarette manufacturers] contend the "other potential causes" defense in a lung cancer case justifies discovery of the victim's lifetime stress experiences, all personality traits, all genetic factors, all environmental exposures during the victim's lifetime, as well as discovering everything ever taken into his body.

This discovery strategy (if allowed by the trial court . . .) enables a cigarette manufacturer to scrutinize every minute of a person's life . . . They claim this defense confers the right to scrutinize every school record from kindergarten through graduate school; every medical record ever made, whether with hospitals, mental institutions, physicians, pharmacists, insurance companies, or employers. . . [T]his defense would allow the [cigarette manufacturer] to interrogate everyone the smoker ever knew . . .<sup>163</sup>

Proving cause in fact in a cigarette case is expensive. A key tactic in the recent cigarette trials has been to force the plaintiff's attorneys to spend large amounts of money. Estimates range from \$1.2 million to \$3 million in the *Cipollone*<sup>164</sup> case, for example. The defendants forced this expenditure by extensive use of the discovery and trial process:

The . . . cigarette manufacturers, in defending cigarette disease claims, have adopted strategies to undermine the civil justice system by making the litigation unaffordable and unfair. . . .

The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their cases . . . .

How can this be? . . . [T]he reason why is simple: they [plaintiffs' attorneys] cannot afford to. The cigarette manufacturers, through a national team of lawyers, have adopted a uniform strategy of defense designed to ensure that few lawyers can afford to take on a cigarette case . . . .

[A] tobacco industry lawyer . . . [explained]: "To paraphrase General Patton, the way we won those cases was not by spending all of [R.J.] Reynolds' money, but by making that other son-of-a-bitch spend all of his."<sup>165</sup>

Clearly the "spend them to death" tactic by the cigarette manufacturers has been effective. The high cost of suing a cigarette manufacturer along with the assumption of risk defense,<sup>166</sup> the "other cause" defense,<sup>167</sup> and statutory bans,<sup>168</sup> has dried up the "new wave" of cigarette litigation.<sup>169</sup> One cigarette manufacturer's attorney stated: "[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners."<sup>170</sup> This use of the civil litigation system raises the question whether cigarette manufacturers should be able to prevent recoveries merely because of their financial strength and adroit manipulation of the system.

163. Townsley & Hanks, *supra* note 32, at 287.

164. See Atlanta J.-Const., June 15, 1988, at A-10, col. 1. See also Rust, *supra* note 14, at 25.

165. Townsley & Hanks, *supra* note 32, at 275-78 (footnote omitted).

166. See Crist & Majoras, *The "New" Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551, 552-54 (1987).

167. See Townsley & Hanks, *supra* note 32, at 286-87.

168. See *supra* note 61 and accompanying text.

169. "There are no droves of lawyers handling cigarette disease cases; there is only a handful across the entire United States. The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their cases, no matter how hard they look." Townsley & Hanks, *supra* note 32, at 276. Compare, Crist & Majoras, *supra* note 166, at 602.

170. Townsley & Hanks, *supra* note 32, at 278.

## V. THE CAUSE IN FACT PROPOSAL

The cause in fact proposal is as follows: a person who proves that he or she has smoked at least one pack of cigarettes a day for fifteen or more years and submits a physician's statement that his or her cancer was probably caused by smoking will receive a presumption that smoking caused his or her cancer.<sup>171</sup> The person will only be able to recover damages that result from four types of cancer: lung,<sup>172</sup> larynx,<sup>173</sup> oral cavity,<sup>174</sup> and esophagus,<sup>175</sup> however.

The effect of giving the smoker a presumption in regard to cause in fact is to shift the burden of proof on cause in fact to the cigarette manufacturer.<sup>176</sup> Of course, the impact of the cause in fact presumption is that in some cases the smoker will recover for a cancer whose actual cause is unknown. This is accepted and is clearly desirable as compared with the present law where no smoker is able to recover for cigarette-caused cancer. That is, under the absolute liability proposal, the risk of failing to prove causation will be on the cigarette manufacturer rather than the smoker.

A challenging question arises when the cigarette manufacturer introduces contrary evidence on cause in fact, however. For example, what happens to the presumption when the cigarette manufacturer presents evidence that the plaintiff's cancer was caused by factory smoke or heredity? Traditional evidence law suggests two possible solutions. First is the Thayer or "bursting bubble" theory:

[T]he only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears. In practical terms, the theory means that, although a presumption is available to permit the party relying upon it to survive a motion for directed verdict at the close of his own case, it has no other value in the trial.<sup>177</sup>

However, the "bursting bubble" theory has been criticized because it gives insufficient weight to presumptions.<sup>178</sup> Numerous courts have rejected the "bursting bubble" theory and have upgraded the effect of the presumption, for social policy reasons, as follows:

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171. One pack a day for fifteen years for smoking caused cancer was selected because that is a benchmark employed in cancer research and it is relatively easy to prove. See *Advertising of Tobacco Products, Hearings Before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce*, H. of Rep., 99th Cong., 2d Sess. 99-167 (1986). See *SMOKING AND HEALTH*, *supra* note 155, at 100, 106. See U.S. DEPT OF HEALTH, EDUC. & WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING: A PUBLIC HEALTH SERVICE REVIEW*, 34, 135-38 (1967) [hereinafter *HEALTH CONSEQUENCES*].

"There is a rise of about 50 percent in the mortality ratio for those who had smoked 15-35 years, with a further rise for those smoking longer than 35 years." *SMOKING AND HEALTH*, *supra* note 155, at 90.

A study of Canadian Pensioners found, however: "For cigarette smokers as compared to nonsmokers, overall mortality ratios were elevated after 5 years of smoking at any time in their life and remained elevated as long as they continued to smoke cigarettes." *HEALTH CONSEQUENCES*, *supra*, at 11.

172. See *SMOKING AND HEALTH*, *supra* note 155, at 102-12. See *HEALTH CONSEQUENCES*, *supra* note 171, at 33-37.

173. *Id.*

174. *Id.*

175. *Id.*

176. See E. CLEARY, *MCCORMICK ON EVIDENCE* 968 (3d ed., 1984).

177. *Id.* at 974.

178. *Id.* at 975.

These courts have been unwilling to rely solely upon the natural inferences that might arise from plaintiff's proof, and instead require more from the defendant in rebuttal, such as, that his evidence be "uncontradicted, clear, convincing and unimpeached." Moreover, many courts also hold that the special policies behind the presumption require that the jury be informed of its existence.<sup>179</sup>

The second is the absolute liability proposal. The absolute liability proposal adopts the upgraded approach and requires that the cigarette manufacturer's proof, in rebuttal, be uncontradicted, clear, convincing, unimpeached, and that the jury be informed of the existence of the cause in fact presumption. The social policy reasons for this are to create a closed system that reallocates the loss to the cigarette manufacturer and to balance the financial strength of the cigarette manufacturer. The fundamental policy is that, as compared to the non-smoker, the cigarette manufacturer should pay for the health costs of smoking.

This approach to cause in fact resembles both the concept of judicial notice and the administrative procedures used in black lung cases. In the 1976 *Shimp*<sup>180</sup> case, "the court took judicial notice of the toxic nature of cigarette smoke and held that the employer must provide a safe workplace where smoking would not be permitted."<sup>181</sup> For coal miners, a rebuttable presumption is used to determine black lung benefits:

When the coal mine worker is disabled by pneumoconiosis, the mine operator is required to pay certain disability benefits. Proof that the individual coal miner's pneumoconiosis was caused by working in the coal mine is accomplished by the use of a rebuttable presumption. After ten years in the mines, the miner's black lung or his death from a respiratory disease is presumed to be caused by such employment, and the burden shifts to the operator to rebut the presumption.<sup>182</sup>

The cause in fact portion of the absolute liability proposal is also similar to the provisions of the National Childhood Vaccine Injury Act of 1986.<sup>183</sup> Under the Act, a person proves cause in fact if he suffers an injury listed in the Act and the onset of the injury is within a set period of time after the vaccination.<sup>184</sup> The recovery rests on no-fault liability and is made from a trust fund that is supported from a tax on vaccines.<sup>185</sup>

Lung, larynx, oral cavity, and esophagus cancers were selected for compensation because they are the most common forms of smoking-caused cancer.<sup>186</sup> There is substantial evidence that heart,<sup>187</sup> stomach,<sup>188</sup> and liver disease<sup>189</sup> as

179. *Id.* at 976 (citations omitted).

180. *Shimp v. New Jersey Bell Telephone Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976).

181. Levin, *The Liability of Tobacco Companies — Should Their Ashes Be Kicked?*, 29 ARIZ. L. REV. 195, 203 (1987).

182. Garner, *supra* note 127, at 315 (citations omitted).

183. 42 U.S.C.S. § 300aa-1 (Law. Co-op. Supp. 1988).

It would be efficient for Congress to develop a compensation program for smokers that resembles the National Childhood Vaccine Injury Act of 1986. However, due to the virtual control of Congress by the cigarette manufacturers, this will not likely occur. See *supra* note 123 and accompanying text.

184. *Id.* at § 300aa-11(c)(1).

185. Omnibus Budget Reconciliation Act of 1987, 26 U.S.C.S. § 9510(a) (Law. Co-op. Supp. 1988).

186. See *supra* notes 172-75.

187. See SMOKING AND HEALTH, *supra* note 155, at 102, 105, 108.

188. See *id.*

189. See *id.*

well as other serious illnesses<sup>190</sup> are also caused by smoking. If the proposal is adopted, these other serious diseases can be considered for later addition. One pack a day was selected as the threshold because it is simple to identify and relatively easy to prove. Researchers tend to use one pack a day as the pivot point for cancer caused by smoking.<sup>191</sup> Fifteen years of smoking was selected as the minimum because that is, in general, when the four compensable cancers begin to appear.<sup>192</sup> Of course, if the plaintiff smokes for less than fifteen years or smokes less than a pack each day, there is no recovery under the proposal. The plaintiff, in that case, would be left to a traditional suit. The absolute liability proposal seeks a balance in regard to fairness. The smoker can only recover for one or more of the four cancers because the cigarette manufacturer is subject to absolute liability. If the plaintiff suffers cancer in another part of the body, he or she must bring a traditional suit.

One problem that will arise under the proposal is what happens if during the fifteen year period the plaintiff smoked numerous brands of cigarettes. Who pays? To answer this we must consider the underlying policies of placing the loss upon the cigarette manufacturer.<sup>193</sup> There are several approaches. First, in order to recover, the plaintiff could file a claim against all of the manufacturers who produced the brands he smoked. They would be treated as joint tortfeasors, each one liable for the whole amount.<sup>194</sup> The plaintiff could elect against whom to enforce the judgment.<sup>195</sup> Second, the plaintiff could file a suit against the manufacturer whose brand he smoked over fifty percent of the time.<sup>196</sup> The manufacturer could, of course, join other cigarette manufacturers.<sup>197</sup>

Third, the smoker or his representative could sue and recover from a cigarette manufacturer whose brand was smoked enough to be a "substantial factor" in the smoker's cancer.<sup>198</sup> Finally, the plaintiff would be required to join in his action the cigarette manufacturers who, when added together, had produced a substantial share of the cigarettes he smoked.<sup>199</sup>

A critique of these solutions is that a cigarette manufacturer will be obligated to pay damages because the plaintiff smoked the defendant's brand only some of the time during the fifteen years prior to contracting cancer. The answer is that the loss should rest on the manufacturer and smokers. With a large number of claims each year, it is likely that each manufacturer will pay its fair share. For example, the judge in the *Collins DES* case stated:

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190. *See id.*

191. *See supra* note 171.

192. *See supra* note 171.

193. *See supra* notes 64-95.

194. *See PROSSER & KEETON, supra* note 36, at 324-30. *See Rosenberg, supra* note 159.

195. *See id.* at 330-32.

196. Fifty percent was selected because it is easy to prove. Smokers would know which brand they smoke most of the time or fifty percent of the time. However, under this requirement, if he smoked three different brands equally, he could not sue under absolute liability.

197. *See Sindell*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132.

198. *See PROSSER & KEETON, supra* note 36, at 267-68.

199. *Compare Sindell*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, and *Rosenberg, supra* note 159.

Each defendant contributed to the *risk* of injury to the public and, consequently, the risk of injury to individual plaintiffs such as Therese Collins. Thus each defendant shares, in some measure, a degree of culpability in producing or marketing . . . . [T]he drug company is in a better position to absorb the cost of the injury. The drug company can either insure itself against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business.<sup>200</sup>

Article I of the United States Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." Because of Article I, it may be suggested that to the extent the proposal adopts absolute liability and modifies cause in fact, it is an unconstitutional usurpation of the congressional power to make law. There are several responses to this argument.

First, the courts through the common law have traditionally dealt with personal injury suits.<sup>201</sup> The courts have charted the common law, as needed, in cases involving personal injury. Many of the concepts originally developed by these courts have been far reaching: strict liability,<sup>202</sup> negligence,<sup>203</sup> cause in fact,<sup>204</sup> proximate cause,<sup>205</sup> governmental immunity,<sup>206</sup> family immunity,<sup>207</sup> contributory negligence,<sup>208</sup> assumption of risk,<sup>209</sup> and comparative fault.<sup>210</sup> The absolute liability proposal, then, is mere accretion, the incremental extension of personal injury law. This reasoning also applies at the state level. Indeed, since each state legislature retains full authority to supercede a judicial decision adopting the absolute liability proposal, it can scarcely be argued that the power of the legislature to make law has been usurped.<sup>211</sup>

Second, although the proposal expands substantive law, it does so in a familiar and a foreseeable manner. The legal and economic impact of smokers' suits against cigarette manufacturers has been debated since 1954.<sup>212</sup> To be sure, absolute liability is the historical foundation of tort law and has been with

200. *Collins*, 116 Wis. 2d at 191-92, 342 N.W.2d at 49 (citations omitted).

201. "In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs . . . ." *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

202. See F. VANDALL, *supra* note 53, at 1-16.

203. See PROSSER & KEETON, *supra* note 36, at 163.

204. See *id.* at 263-68.

205. See *id.* at 263-321.

206. See *id.* at 1032-56.

207. See *id.* at 904-07.

208. See *id.* at 451-62.

209. See *id.* at 480-98.

210. See *id.* at 469-80.

211. For example, strict liability was held to apply to blood infected with hepatitis in *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970). However that decision was soon overruled by the Illinois legislature. ILL. ANN. STAT., Ch. 111 ½, § 5102 (1977).

212. See *supra* note 30. "[In] the Lartigue case, filed in Louisiana in 1958, Frank Lartigue . . . died of lung cancer in 1955. His widow filed a \$779,500 suit . . . against the companies whose tobacco products Mr. Lartigue had smoked: R.J. Reynolds and Liggett and Myers." E. WHELAN, *supra* note 1, at 155.

"[T]he longer term outlook for this cash-rich [cigarette] industry is clouded by a growing anti-smoking movement that is sweeping the nation. The uncertainties include a mountain of health-related litigation against cigarette manufacturers and bills to restrict smoking in public places and to double cigarette excise taxes." Atlanta J.-Const., Feb. 15, 1987, at E-1, col. 2.

us since, at least, 1466.<sup>213</sup> Cause in fact has been under metamorphosis since 1948.<sup>214</sup> Like many "new" cars, the absolute liability proposal merely draws existing components together into a functional package. In response to the problems reflected in *Cipollone*<sup>215</sup> and other recent cases,<sup>216</sup> absolute liability suggests a foundational concept to fill a contemporary need: the reallocation of losses in cigarette-caused cancer cases.

## VI. CONCLUSION

Under the absolute liability proposal, a person with cancer who has smoked for at least 15 years is able to recover lost wages, medical expenses, and up to \$100,000 for pain and suffering. Preemption by the Cigarette Labeling and Advertising Act is not a defense. Indeed, the only defense is that cigarette smoke did not cause the lung, larynx, oral cavity, or esophagus cancer. To assist the plaintiff to recover, he or she is given a strong presumption that smoking did in fact cause the cancer. A goal of the proposal is to reallocate the costs of smoking from the shoulders of non-smokers to the shoulders of the cigarette manufacturers and indirectly, through higher costs, also to the shoulders of the smokers. If there is a resulting reallocation of resources in the cigarette industry, this is to be preferred to the present imbalance where all of the loss is borne by non-smokers, insurance companies, public hospitals, and public health care professionals. The clear message from 37 years of cigarette litigation failures is that a fundamental change is needed, one that places the loss on the cigarette manufacturer: absolute liability.

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213. Anonymous, Y.B. 5 Edw. 4, f. 7, pl. 18 (K.B. 1466).

214. See *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1.

215. See *Cipollone*, 893 F.2d 541.

216. See *supra* cases cited in note 52.

